Office - Supreme Court, U.S.
FILED
OCT 27 1952

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 419

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR

Petitioners,

vs.

DEENA ARTWARE, INCORPORATED

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOSEPH S. FREELAND,
Citizens Savings Bank Building,
Paducah, Kentucky.
NATHAN DUFF,
280 Hobart Street,
Perth Amboy, New Jersey.

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
JOSEPH E. FINLEY,
736 Bowen Building,
Washington 5, D. C.

Counsel for Petitioners.

INDEX

	PAGE
Prayer	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Specification of Errors to be Urged	8
Reasons for Granting Writ	8
Conclusion	14

Table of Cases Cited

American Federation of Labor v. Swing, 312 U.S. 321	9
Cafeteria Employees Union v. Angelos, 320 U.S. 293	9
Deena Artware, Inc., 86 NLRB 732; 95 NLRB 9	4, 11
Ford Motor Co. v. NLRB, 305 U.S. 364	8
Mitchell v. Overman, 103 U.S. 369	8
N.L.R.B. v. International Rice Milling Co., 341 U.S. 665	10
N.L.R.B. v. Service Trades Chauffeurs, 191 F. 2d 65	10
Oil Workers International Union, 84 N.L.R.B. 315	10
Rabouin v. N.L.R.B., 195 F. 2d 906	14
Ryan Construction Co., 85 N.L.R.B. 417	10
Thornhill v. Alabama, 310 U.S. 88	9

Statutes Cited

Labor-Management Relations Act of 1947	2, 8
28 U.S.C.A. 1254(1)	2
29 U.S.C.A., Sec. 187(a)(1) and (a)(2)	2
29 U.S.C.A., Sec. 158(b)(4)(A) and (B)	2

Miscellaneous

Cong. Rec. 3954, 4457, 5107	13
Dennis, *The Secondary Boycott*, 1 N.Y. Univ. Annual Conference on Labor, 359	13
Developments in the Law—The Taft-Hartley Act, 64 Harv. L. Rev. 781	13
House Report No. 510, 80th Cong., 1st Sess., p. 43	13
Senate Report No. 105 on S. 1126, 80th Cong., p. 22	13

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. ——

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR

Petitioners,

vs.

DEENA ARTWARE, INCORPORATED

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 30, 1952.

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky, denying motions for a directed verdict, was made in chambers and is not reported in the transcript herein or elsewhere. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 198 F. 2d 637 and appears at R. 341.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1952 (R. 341). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

In this case the courts below were called upon to construe and apply Section 303(a)(1) and (2) of the Labor-Management Relations Act of 1947. In timely motions and in Specification of Points on Appeal (R. 333), as well as in brief and oral argument, the questions involved in this petition were raised before the courts below and passed upon adversely to petitioners.

QUESTIONS PRESENTED

1. Whether evidence, standing alone, that picketing directed against a primary employer was extended to embrace the employer's entire immediate premises, including a construction project thereon, is sufficient to establish an inducement of the construction employees to concerted refusal to work in violation of Section 303(a)(1) of the Labor-Management Relations Act of 1947?

2. Whether Section 303(a)(2) of the Labor-Management Relations Act of 1947 permits "secondary" picketing for the purpose of requiring a primary employer to bargain with a certified labor organization even though such "secondary" picketing might also violate Section 303(a)(1) of such Act?

STATUTE INVOLVED

Section 303(a)(1) and (2), 29 U.S.C.A., Sec. 187(a)(1) and (a)(2), (which are the counterpart of Sections 8 (b)(4)(A) and (B), 29 U.S.C.A., Sec. 158(b)(4)(A) and (B)), are involved in this case, They read as follows:

> "Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the

course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;"

STATEMENT

Petitioners are labor organizations against which respondent, a Kentucky corporation engaged in manufacturing pottery lamp bases in Paducah, Kentucky, brought an action for damages for alleged violation of Section 303(a)(1) and (2) of the Labor-Management Relations Act of 1947. The complaint, filed December 10, 1948 (R. 3) and as finally amended (R. 32), alleged substantially that petitioners had, by a picket line established pursuant to a strike against the plaintiff, prevented employees of a third party—Vandevelde & Augustus, general contractors—from doing construction work on an addition being made to plaintiff's plant immediately adjacent to such plant and on its immediate premises, thus causing the third party to cease doing business with plaintiff with resulting damage to plaintiff. Plaintiff alleged, both in its original (R. 5) and amended (R. 35) complaint, that *the* object of the strike was to require plaintiff to bargain with the petitioner United Brick & Clay Workers, and alleged that this organization had not been certified under the Act. Defendant filed an answer (R. 10) which denied that the picketing was secondary, but admitted (R. 13) that the purpose of the picket-

ing was to require plaintiff to bargain with the United Brick & Clay Workers which it was alleged (R. 15) had been duly certified by the National Labor Relations Board as the exclusive bargaining representative of plaintiff's employees, but with which plaintiff had refused to bargain.[1]

The case came on for trial on two occasions before District Judge Roy M. Shelbourne. At the close of plaintiff's testimony at the second trial[2] petitioners here, defendants below, moved for a directed verdict on the grounds, first, that the picketing was primary and the evidence was insufficient to indicate a violation of Section 303(a)(1), and, second, that the proviso to Section 303(a)(2) operated to sanction the picketing even though considered secondary in nature, the pleadings as well as the undisputed evidence disclosing that the picketing was for the purpose of requiring plaintiff to bargain with defendants United Brick & Clay Workers, and that at the time of such picketing the United Brick & Clay Workers had been duly certified as the exclusive bargaining representative of plaintiff's employees (R. 221). At the close of all of the testimony plaintiff made similar motions (R. 306, 324). These motions were overruled (R. 229, 325), the second solely on the ground that the union involved had not been certified as a matter of law, and that therefore Section 303(a)(2) was inapplicable.[3]

[1] Plaintiff's refusal to bargain with petitioner United Brick & Clay Workers had been the subject of an unfair labor practice proceeding brought against the plaintiff under Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. The National Labor Relations Board had found the plaintiff guilty of violating Section 8(a)(5) by refusing to bargain with petitioner, as well as of other unfair labor practices directed against that organization and its members. *In the Matter of Deena Artware, Inc.*, 86 NLRB 732, 95 NLRB 9. This decision was affirmed by the United States Court of Appeals for the Sixth Circuit in *Deena Artware v. NLRB*, (F. 2d) , 30 LRRM 2479. In that case the Board had also ruled, although collaterally, that the very picketing involved in the present case was primary and did not violate Section 8(b)(4)(A), and this ruling was affirmed by the Sixth Circuit.

[2] The first trial had resulted in a jury disagreement.

[3] This ruling was made in chambers and does not appear in the record. It has not been controverted that the sole basis for the trial court's refusal to apply Section 303(a)(2) was its determination that petitioner United Brick & Clay Workers was not certified as a matter of law, and that therefore the section could not apply. For that reason and no other the trial court refused to direct a verdict that the union's secondary picketing was privileged, and did not submit any question specifically under Section 303(a)(2) to the jury.

The facts in respect to the nature of the picketing are well stated in the opinion of the court below. Briefly, that portion of the record most favorable to Deena's contentions discloses as follows: In May of 1948 the petitioner Brick & Clay Workers, having won an N.L.R.B. election, called a strike against Deena Artware, to which the petitioner American Federation of Labor had lent assistance, for the purpose of requiring that company to bargain (R. 247). Prior to the time the strike was commenced, the company had started construction of an addition to its existing plant; the construction project was immediately adjacent to the company's principal plant, separated by a single-track rail spur but physically connected to it by overhead ramps and on the company's immediate premises (R. 34, 165). A warehouse was located across the tracks immediately adjacent to the construction project, and the warehouse employees as well as the employees in the existing plant used entrances in the rear of the two buildings (R. 241). Picketing was carried on both in front and to the side of the plant, as well as beyond the tracks, past the warehouse and past the entire construction project (R. 249). This picketing was sporadic, and, although contradicted, there is evidence to indicate that it was carried beyond the tracks only when construction workers sought to enter the premises to resume construction work (R. 140). The picket signs were directed against Deena Artware only (R. 139, 238, 250). No attempts were made to solicit the support of construction employees by oral communication or otherwise (R. 142, 146, 156, 159), and no attempt was made by the company to introduce any evidence that the construction workers were induced not to work other than by the mere presence of the picket sign directed against Deena.[4] There is no evidence whatsoever of any inducements to *concerted* sympathetic activities other than the mere presence of the

[4] The contractor himself, testifying as Deena's witness, stated that no one had asked any of his employees not to work and further stated that it was his impression that the picketing was directed against Deena only (R. 142, 146).

picket line. The record simply discloses that, as the construction workers happened to approach the Deena premises, they simply refused to cross the picket line (R. 240-50). Picketing was at all time confined to Deena's actual premises, including the construction project, and at no time were the premises or the place of business of the construction employer picketed, nor were any inducements made to union members employed by such construction employer at their union meetings or elsewhere.

The undisputed facts respecting the question of certification are these: Following an election conducted by the National Labor Relations Board on March 17, 1948, and won by petitioner United Brick & Clay Workers (R. 182), the Board, through a clerical error, issued a Certificate of Results of Union Authorization Election instead of a Certificate of Representation (R. 187). The union and the employer did not notice that the Certificate had been issued on the wrong form, and the employer, without prejudice, proceeded on the assumption that a proper certificate had been issued (R. 186). The error was not discovered until August 9, 1948, at which time the Board corrected its mistake with a *nunc pro tunc* certificate dated April 16, 1948 (R. 187).[5]

Since the activities herein might constitute a violation of either 303(a)(1) or (2) unless the proviso to 303(a)(2) were applicable, and since the court had held that the proviso did not apply because the union was not properly certified as a matter of law, the court submitted the case to the jury under an instruction (R. 311) which would involve a violation of either Section 303(a)(1) or (2). The jury returned a verdict in favor of plaintiff in the sum of $29,985.85 (R. 326), and the court ordered judgment accordingly (R. 327).

---

[5] These dates are important because the picketing which was the subject of the lawsuit had been carried on in June and July of 1948, and the question arises as to whether the union was "certified" during that period.

An appeal from the judgment of the District Court was duly taken to the United States Court of Appeals for the Sixth Circuit (R. 331). The Statement of Points on Appeal included (R. 334) the point that the picketing was primary but, even if considered secondary, was privileged under Section 303(a)(2). The case was argued before the Sixth Circuit on February 14, 1952, and it was not until July 30, 1952, that that court issued its decision affirming the judgment below (R. 341). That court ruled against all of the contentions made by petitioners. In respect to the contention that there was insufficient evidence to indicate a violation of Section 303(a)(1), the court ruled that since it was not necessary to extend the primary picket line around the area of construction in order to cover all the entrances to the existing plant and warehouse, and since the picketing of the construction area was not continuous but was in effect only when attempts were made to perform construction work, this was sufficient to take to the jury the question of whether the picketing was secondary. In respect to the contention that the proviso to Section 303(a)(2) privileged such picketing even if it were secondary, the court ruled that, "Although there is some basis for such a construction of the two sections [the construction of Section 303(a)(1) and (2) as contended for by petitioners] . . . "We are of the opinion that Section 303(a)(2) pertains to a specific, restricted field of labor activity, not necessarily included in the provisions of Section 303(a)(1), but in any event withdrawn from its coverage for the purpose of being treated as a separate and independent field of labor activity, and that it is not to be treated as nullifying the effect of other activities of labor organizations proscribed by Section 303(a)(1)." In its brief before the Court of Appeals respondent Deena Artware did not strongly urge that petitioner United Brick & Clay Workers Union had not been properly certified, and the Court of Appeals did not discuss the point, apparently assuming in its decision that the cer-

tification, as corrected by the Board in its *nunc pro tunc* order, was a sufficient one.[6]

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred:

1. In holding that the evidence was sufficient to take to the jury the question of whether the picketing induced concerted sympatheic action by employees of a neutral so as to amount to a violation of Section 303(a)(1).

2. In holding that even though the picketing of the construction project on plaintiff's premises constituted a violation of Section 303(a)(1), nevertheless it was not privileged under the proviso to Section 303(a)(2).

3. In affirming the judgment of the District Court in refusing to direct a verdict for petitioners on the ground that the evidence was insufficient to indicate a violation of Section 303(a)(1) and on the ground that in any event the picketing activities complained of were privileged under Section 303(a)(2).

REASONS FOR GRANTING WRIT

This case involves important questions concerning the construction, meaning and application of Sections 303 (a)(1) and (2) and their counterpart Sections 8(b)(4)(A) and (B) of the Labor-Management Relations Act of 1947 and the administration of that Act under the latter section by the National Labor Relations Board.

1. In so far as concerns the holding of the court below that the evidence is sufficient to take to the jury the question of whether Section 303(a)(1) was violated, that holding is in probable conflict with applicable decisions of this

[6] The same issue was involved in the NLRB proceedings against Deena Artware, in which that company advanced as a defense the secondary nature of the picketing. Since the Board found the picketing to be primary, it did not pass upon the application of the counterpart of Section 303(a)(2) there involved. The trial examiner in that case, in holding that the picketing was privileged even though secondary, concluded that the Board's error in certificate issuance was "plainly clerical in nature and without legal significance." *Cf. Mitchell* v. *Overman*, 103 U. S. 369, and *Ford Motor Co.* v. *NLRB*, 305 U. S. 364.

Court, as well as in probable conflict with decisions of several of the Circuit Courts of Appeals on the same subject and is in direct conflict with determination on the subject made by the National Labor Relations Board, including a determination in this very case. The identical picketing here involved was held by the court below not to violate the counterpart of Section 303(a)(1)—namely, Section 8(b)-(4)(A)—in the Labor Board proceeding, while such picketing was held to violate Section 303(a)(1) in the present case.

In any event, the question of federal law involved herein is an important one which should be settled by this Court. The legitimacy of peaceful primary picketing at the immediate premises of an employer has been called into serious question by the determination below; if under the limited evidence introduced herein the picketing activities are proscribed, there are few cases in which the mere confrontation of neutral employees with a picket sign as they approach the premises where a primary labor dispute exists would not likewise be proscribed. Further, the determination of the court below would seemingly restrict the the picketing at the situs of a primary dispute to actual entrances and, further, would require picketing to be continuous rather than to be carried on only when persons are approaching the premises. These are requirements contrary to the concept of peaceful picketing as heretofore traditionally carried on by labor organizations in this country, and as expounded in such cases as *Thornhill* v. *Alabama*, 310 U.S. 88; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293. Further, they are requirements which do not appear in the Act and are absent from its legislative history. The question of the validity of the picketing carried on in the instant case is of vital importance to all organized labor, and only a determination by this Court can determine the status of such picketing under the Taft-Hartley Act.

In the present case the union's inducements through its picket signs directed at Deena reached employees of neutral

employers only as they happened to approach the picketed place of business; that the picket signs were raised only as the neutral employees approached the premises, or that the pickets paraded past the premises at points other than actual entrances, assuredly in itself is no evidence of inducement to concerted, as distinguished from individual, sympathetic activities by neutral employees. This Court at least has indicated no such restrictions when, in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, at 671 it stated:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Section 8(b)(4)."

Here, as there:

> "There were no inducements or encouragements applied elsewhere than on the picket line. The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at the Kaplan employees in a manner traditional in labor disputes."

Cf. N.L.R.B. v. *Service Trades Chauffeurs*, 191 F. 2d 65, at 68.

The National Labor Relations Board, in decisions cited favorably by this Court in the *Rice Milling Company* case (341 U.S. 665, 672 f.n. 6), has specifically held that Section 8(b)(4) does not proscribe primary picketing which has been deliberately extended beyond normal employee entrances to embrace a construction job located on the primary employer's premises. *Ryan Construction Co.*, 85 N.L.R.B. 417; *Oil Workers International Union*, 84 N.L.R.B. 315. Indeed, as previously mentioned, in this very case the Board has ruled that the precise picketing here involved

was primary rather than secondary (*Deena Artware, Inc.*, 86 N.L.R.B. 732)—a ruling sustained by the court below. It is respectfully submitted that Section 303(a)(1) or its counterpart Section 8(b)(4)(A) requires evidence other than the extension of a picket line at the situs of a primary labor dispute to a construction project located on the immediate employer's premises in order to indicate an attempt to induce concerted secondary or sympathetic action by neutral employees if peaceful primary picketing as traditionally conducted is to survive. The National Labor Relations Board and the Second Circuit, in *Service Trades Chauffeurs, supra,* agree with this principle, and this Court in *Rice Milling, supra,* has indicated need for more specific evidence of inducement to concerted sympathetic conduct. A conflict in principle exists which can be resolved only by this Court.

2. In so far as concerns the holding of the court below that Section 303(a)(2) does not sanction secondary picketing even though to require an employer to deal with a certified labor organization, that holding is of extremely doubtful validity, and the question involved is of sufficient gravity to be settled by this Court.

(a) The plain and literal language of Section 303(a)(2) would seem clearly to permit secondary picketing for the purpose of requiring an employer to bargain with a certified union; labor organizations throughout the country have been proceeding on this assumption, and the National Labor Relations Board has refused to process cases in which employers have charged such activity to be violative of the Act. If, as indicated by the court below, secondary activity under Section 303(a)(2) would also constitute secondary activity under Section 303(a)(1), so that such activity can be prosecuted separately as a violation of Section 303(a)(1) regardless of whether the purpose of the picketing is to require an employer to bargain with a duly certified union, then Section 303(a)(2) is rendered meaningless; it is difficult to conjure up a situation involving secondary picket-

ing under Section 303(a)(2) which would not also constitute a violation of Section 303(a)(1), and it is impossible to believe that Congress intended protection of secondary activities to obtain recognition and bargaining rights for a certified union only in the extremely rare situations where such activities might not also constitute a violation of Section 303(a)(1). If the construction given to Sections 303 (a)(1) and (2) below is left undisturbed, then numerous union activities in a field of major importance to labor organizations, heretofore considered legitimate, will have been outlawed. The proscriptions in Taft-Hartley are sufficiently broad already without withdrawing or rendering ineffective exceptions to such proscriptions set forth in the Act in plain language. Both as respects peaceful and traditional activities of labor organizations designed to require an employer to bargain with a labor organization after it has been duly certified by the National Labor Relations Board as an exclusive bargaining representative, and as respects efforts of the Board to administer the Act with due regard to the rights of contending litigants, an indication from this Court as to the meaning and application of Section 303(a)(2) is required. The case is one of first impression in the courts, no other federal or state court having decided the issue. The court below has decided an important question of federal law which has not been but should be settled by this Court.

(b) The decision of the United States Court of Appeals for the Sixth Circuit construing Section 303(a)(2) as embracing a field of activity separate and apart from Section 303(a)(1), so that activity violating both Section 303(a)(2) and Section 303(a)(1) could be proscribed under that latter section even though it might be privileged under the proviso clause of Section 303(a)(2), is erronous. It flies against the plain and literal language used by Congress in Section 303(a)(2). The use of the phrase "*other* employer" in Section 303(a)(2) clearly contemplates secondary employers not involved in the dispute over recognition or bargaining rights, and the proviso plainly contemplates legitimatizing

activity directed against such secondary employer for the purpose of securing bargaining rights if the activity is on behalf of a union which has utilized Board procedures to obtain formal certification. To say that when such secondary activity also constitutes a violation of Section 303(a)(1) it becomes illegal under that section is to render Section 303(a)(2) either meaningless or utterly incapable of achieving its apparent purpose of protecting unions in their quest for recognition after having received Board certification. If it cannot be presumed that Congress would do a vain or idle thing, neither can it be presumed that Congress would take away with its left hand what it has given with its right.

The meager legislative history regarding Section 303 (a)(2) supports the conclusion that Congress intended that section to privilege secondary activity by certified unions to achieve recognition. Both the Senate (S. Report No. 105 on S. 1126, 80th Cong., p. 22) and the House (H.R. No. 510, 80th Cong., 1st Sess., p. 43) Reports, in discussing Section 8(b)(4)(B) (the counterpart of Section 303(a)(2)), state that under such section "*strikes and boycotts for recognition were not prohibited if the union had been certified as the exclusive representative.*" (Emphasis supplied.) See also 93 Cong. Rec. 3954, 4457 and 5107.

Finally, although as before stated there is no judicial determination or discussion of the issue herein [7] other than that of the court below, whatever legal writing there is on the subject is unanimous in asserting that secondary strikes to force a primary employer to bargain with a certified union are permissible, and subdivision (B) or subdivision (2) creates an exception to subdivision (A) or (1). See Dennis, *The Secondary Boycott*, 1 New York University Annual Conference on Labor, 359, at 370, and *Developments in the Law—The Taft-Hartley Act*, 64 Harv. L. R. 781, 804.

The court below has perverted the plain language of the

[7] The trial examiner in the Deena Artware Labor Board proceeding held specifically that Section 8(b)(4)(B) had the effect of privileging secondary activity by certified unions to secure bargaining rights even though such activity also violated 8(b)(4)(A).

Act, thus adding yet another barb to a ar which has penetrated deeply enough as it is. It is remedy such judicial legislation by const this Court to its framers have worded it. The admonitig the Act as Circuit is entirely applicable here: of the Second

> "In a matter of such bitter controv as the Taft-Hartley Act, the product of careful leg and compromise beyond which its pro tive drafting way could not force the main body o onists either courts should proceed cautiously." gislators, the *tional Labor Relations Board*, 195 F. *bouin* v. *Na-* 906, at 912.)

CONCLUSION

For the foregoing reasons this Petition f Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH S. FREELAND,
Citizens Savings Bank
Building,
Paducah, Kentucky.
NATHAN DUFF,
280 Hobart Street,
Perth Amboy, New Jersey.

J. ALBERT
HERBERT S OLL,
JAMES A. HATCHER,
JOSEPH E. ENN,
736 Bow NLEY,
Washin Building,
n 5, D. C.

Counsel for Petitioners.

Supreme Court of the United States

October Term, 1952.

No. 419.

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR, - - - - - - - Petitioners,

versus

DEENA ARTWARE, INCORPORATED, - - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

James G. Wheeler,
WHEELER & MARSHALL,
901-6 Citizens Bank & Trust Bldg.,
Paducah, Kentucky,
Counsel for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

PAGE

STATEMENT 1– 4

ARGUMENT 5–13

I. The Evidence, Including the Physical Features Shown, Was Sufficient to Require a Submission to the Jury of the Issue as to Intention and Effect of the Picketing of the New Construction Area.. 5– 7

II. (A) The Contention of Petitioners That One of the Objects of the Picketing Was to Force Deena to Bargain With a Certified Union Did Not Prevent Submission to the Jury of the Question as to Whether Another Object of the Picketing Was to Force an Independent Contractor to Cease Doing Business With Deena 7–10

(B) The Exception in 303 (a) (2), Making That Paragraph of the Statute Inapplicable if a Labor Organization Has Been Certified, Should Not Be Extended by Implication to Other Sections and Paragraphs. Implied Exceptions to the Express Provisions of a Statute Are Not Favored.....10–13

MAP 14

ALPHABETICAL INDEX OF AUTHORITIES.

PAGE

Amazon Cotton Mill v. Textile Workers Union, 4th Circuit, 167 F. 2d 183 12

In re David Bell Scarves, Inc., 52 F. 2d 755, Affirmed, 61 F. 2d 771 12

International Brotherhood of Electrical Workers, Local 501, A. F. of L., et al. v. National Labor Relations Board, 71 S. Ct. 954, 341 U. S. 695 6

Labor Law Journal, September, 1951, Secondary Boycott Provisions Clarified 7, 10

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., et al. v. National Labor Relations Board, 71 S. Ct. 966, 341 U. S. 707 ..... 6, 9

Maxwell v. Moore, 22 Howard 185 12

National Labor Relations Board v. Denver Building and Construction Trades Council, et al., 71 S. Ct. 943, 341 U. S. 675 6

National Labor Relations Board v. International Rice Milling Company, Inc., et al., 71 S. Ct. 961, 341 U. S. 665 6

Timkin-Detroit Axel Company v. National Labor Relations Board, 6th Circuit, 197 F. 2d 512 12

U. S. C. A., Sec. 187, Title 29 ..... 1, 10

Supreme Court of the United States

October Term, 1952.

No. 419.

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR, - - - - *Petitioners,*

v.

DEENA ARTWARE, INCORPORATED, - *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

We have attached to the last page of this brief a reproduction of the map filed with petitioners' brief below. This is the map which the Court of Appeals found helpful (R., p. 346).

Deena Artware, Incorporated, filed an action to recover damages from the Unions, on account of a violation of *Section 303 of the Labor Management Relations Act,* Section 187, Title 29, U.S.C.A. An appeal was prosecuted from the judgment in the sum of $29,985.85, based on the verdict of the jury. The judg-

ment was affirmed. Respondent, Deena Artware, Incorporated, is engaged in the business of manufacturing and selling lamp bases at the plant located on the northeast corner of Third and Ohio streets, on the property marked "existing Deena plant" on the map. East of, and in rear of the existing Deena Plant is a 50-foot right of way of a railroad which serves an industrial area in Paducah. East of the 50-foot railroad right of way is a small warehouse building, marked on the map "existing Deena warehouse 40 x 120 feet." Deena acquired the remainder of the half block of vacant property east of the railroad bounded on the west by the right of way, on the north by Jackson Street, on the east by Second Street, and on the south by Ohio Street. This vacant property fronted on Second Street 303 feet 8 inches. On the half block between Jackson and Ohio and Second streets, and the railroad right of way, Deena planned to construct a new plant, which would cover the entire area above referred to, where the manufacturing and processing of its products could be completely performed. It was planned that a monorail overhead conveyor would run from the existing plant over the railroad right of way to the new plant, and Deena intended to use the new plant to convert into the completed product the lamp bases manufactured in the existing Deena plant.

In December, 1947, Deena entered into a contract with Vandevelde & Augustus, independent general contractors, for the construction of a plant on the area marked "area of new construction" on the map. Prior to May 26, 1948, when the work stoppage referred to

in the evidence began, the general contractors had begun the construction work and caused large quantities of material and equipment to be transported into Kentucky from other States. The foundation of the proposed new plant had been completed and the first carload of structural steel was placed on railroad tracks at the new construction site, on or about June 1, 1948. Another carload arrived a few days later. When an effort was made by the sub-contractor employed by the general contractors to unload the structural steel, the Unions placed a picket line around the construction work. Neither the General Contractor nor the sub-contractors had any labor dispute with their employees. Whenever an effort was made by them, however, to unload the steel, or to work on the construction of the building, the Unions picketed the construction job, and prevented the employees of the general contractors and sub-contractors from working. As a result of this picketing, the employees of the general and sub-contractors were induced and encouraged to engage in a concerted refusal to perform services for their employers. The object of the Unions was to force the general contractors to cease doing business with Deena and this purpose was accomplished, so that finally the latter part of July, 1948, the construction of the building was finally discontinued and abandoned.

As shown by the map, there was no door or entrance on the north side of the existing warehouse. There were entrances from the warehouse and plant, opening on the spur track. These entrances were near

Ohio Street; all other entrances were on Ohio Street, the main entrance to the plant being at the corner of Third and Ohio streets. The picket line complained of below was extended east on Ohio Street to Second Street; north on Second Street to Jackson Street; west on Jackson Street to the spur track of the railroad, and south along the spur track to Ohio Street. In this way, it included the entire area of new construction. The Unions could have picketed all doors and entrances of the existing plant and warehouse without in any way including in the picket line the area of new construction. The picket line was extended to include the area of new construction for the purpose of preventing the employees of general contractors from entering the area and thus forcing the contractors to cease doing business with Deena.

The first question presented by petitioners questions the sufficiency of the evidence to take the case to the jury on the issue as to the purpose of the picketing of the area of new construction. The second question is whether the words in Section 303 (a) (2) "unless such labor organization has been certified * * *" should be extended by implication to Section 303 (a) (1) under which the case was submitted to the jury and the judgment rendered.

ARGUMENT.

I.

The Evidence, Including the Physical Features Shown, Was Sufficient to Require a Submission to the Jury of the Issue as to Intention and Effect of the Picketing of the New Construction Area.

The physical facts shown by the map and described by the witnesses indicate that it was not necessary, in order to cover by picketing the entrances to the plant, to extend the picket line around the area of new construction. The picketing of the area of new construction was maintained only when attempts were made to unload steel from the cars or to do work in the area (R. 75, 140, 145, 147, 148).

H. A. Downs, superintendent for the steel subcontractor, testified that whenever he attempted to work the picket line was extended around the area. From June 1st to the last week in July, when the work was abandoned, he was there from once to three times a day. Usually the picket line "* * * wasn't walking around it until they discovered I was there, or some of my men there." When an effort was made to begin work the picketing of the construction work was resumed (R. 161, 162, 163). Some of the pickets carried a sign which read "respect the picket line" (R. 164). It was shown that representatives of the Unions talked to employees of the contractors (R. 152, 153, 198). There is evidence, brought out by the petitioners on cross-examination of R. C. Jennings, the steel subcontractor, that the Unions' pickets asked his employees not to cross the picket line (R. 158, 159).

In June, 1951, before this case was briefed on appeal to the United States Court of Appeals, the Supreme Court announced the decision of the following cases, involving secondary boycotts:

National Labor Relations Board v. *Denver Building & Construction Trades Council, et al.*, 71 S. Ct. 943, 341 U. S. 675.

International Brotherhood of Electrical Workers, Local 501, A. F. of L., et al., v. *National Labor Relations Board*, 71 S. Ct. 954, 341 U. S. 695.

National Labor Relations Board v. *International Rice Milling Co., Inc., et al.*, 71 S. Ct. 961, 341 U. S. 665.

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., et al., v. *National Labor Relations Board*, 71 S. Ct. 966, 341 U. S. 707.

All of these cases, as decided by the lower courts, had been considered and discussed in argument before the District Court. The decisions established the applicable rules of law and set at rest some of the questions debated. The Court considered the picketing of construction jobs where picketing directed at employers other than the "unfair" sub-contractor influenced the employees of such employers to quit work. This accomplished its purpose of forcing the general contractor to cease doing business with the unfair subcontractor, and it was held that this was a clear violation of the provisions of the Taft-Hartley Act, on which this action was based.

We found helpful in briefing below an article on "Secondary Boycott Provisions Clarified" by J. Al-

bert Woll, James A. Glenn, and Herbert S. Thatcher, published in the Labor Law Journal of September, 1951. The comments and conclusions of opposing counsel as set out in that article cannot be reconciled with their argument that the District Court erred in submitting this case to the jury on the issue of violation of 303 (a) (1).

II.

(A) The Contention of Petitioner that One of the Objects of the Picketing Was to Force Deena to Bargain With a Certified Union, Did Not Prevent Submission to the Jury of the Question as to Whether Another Object of the Picketing Was to Force an Independent Contractor to Cease Doing Business With Deena.

In its complaint, Deena alleged not only that the object of the picketing of the new construction site was to force the general contractor to cease doing business with Deena, but also that its object was to force Deena to bargain with a Union which had not been certified as a representative of its employees. In other words, it complained not only of a violation of 303 (a) (1), but also of 303 (a) (2).

It is stated in the petition, which we must treat as a brief, that the motions for directed verdict were overruled solely on the ground that the Union involved had not been certified as a matter of law, and that, therefore, Section 303 (a) (2) was inapplicable. Petition for certiorari, page 4 and footnote 3. It is admitted in the footnote that the record does not support the statement, and we think the record contra-

dicts it. Our position is that opposing counsel is in error in stating that this was the ground on which the Court overruled motions for directed verdict. Counsel is certainly in error in stating that it has not been controverted that this was the basis of the Court's refusal. We have controverted it and do now controvert it.

The Court did not submit the case to the jury on the question of a violation of 303 (a) (2). An examination of the instructions of the Court, pages 308, 311 and 313 of the Record, will show that the Court permitted the jury to consider only the violation of 303 (a) (1). We argued before the lower court on behalf of the plaintiff that there had been no certification by the National Labor Relations Board within the meaning of Section 303 (a) (2). After a consent election conducted by the Board in March, 1948, the Board sent the respondent a certification that there had been a union security election. This, of course, was a mistake. The proper certification was not sent until August 9, 1948, after all of the events complained of had transpired. It was dated back, however, to April 16th, and the letter transmitting it showed that the Board had discovered its mistake, and was seeking to correct it. Petitioners, of course, cannot complain of the favorable action of the District Court on this point. Apparently, petitioners expected the Court to submit the case, not only on the question of violation of 303 (a) (1), but also of 303 (a) (2), since they offered a formal instruction (R. 319, 320) on the violation of 303 (a) (2). It will be noted that in the instructions tendered

by the petitioners, they separated clearly the Court's instruction as to a violation of 303 (a) (1), page 319, from the instructions as to a violation of 303 (a) (2), pages 319, 320. In the manner in which petitioners tendered these instructions, they recognized the separation of the two violations under the statute, and they are not in a position to complain of the failure of the Court to submit the case to the jury on both questions.

Local 74, United Brotherhood, &c., v. *N. L. R. B.*, 341 U. S. 707, was a case in which a secondary boycott was made applicable at a residence where certain wall and floor coverings were being installed by a merchant, who insisted on installing them and who used non-union labor. The Court affirmed the 6th Circuit, holding that the action of the union in striking to force the owner to cancel the installations contract was a secondary boycott, even if the strike also had as its object the enforcement of the legitimate rule that union members did not work on open shop projects. The complaint was against petitioner's use of secondary pressure upon Watson, the merchant who sold the wall and floor coverings, and insisted on installing them. We quote the comments of Messrs. Woll, Glenn and Thatcher in the magazine article above referred to in discussing this case:

> "The Court found that it was clearly an object of the action engaged in by Local 74 to force the carpenter contractor to cancel the installation contract.
>
> "The Court found it immaterial that another object was to enforce a union rule that members should not work on a project where non-union men

are employed; any such union rule must bow to the express provisions of the Taft-Hartley Act" (*Idem* 682).

The same ruling was made in *N. L. R. B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, in which the Court said that it was not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the sub-contractor's contract.

II.

(B) The Exception in 303 (a) (2), Making That Paragraph of the Statute Inapplicable if a Labor Organization Has Been Certified, Should Not Be Extended by Implication to Other Sections and Paragraphs. Implied Exceptions to the Express Provisions of a Statute Are Not Favored.

Section 303 of the Labor Management Relations Act (Section 187, Title 29, U.S.C.A.) is in part as follows:

"(a) It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike, or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer . . . to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization . . . ;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . ."

It will be noted that each of the sub-paragraphs 1, 2, 3 and 4 defines a separate violation. Reference to certifications by the Board is made in Sections 2, 3 and 4. The effect of the certification in connection with each provision is separately set out. There is no ambiguity which would justify the application to 303 (a) (1) of an exception, or other qualifying provision of 303 (a) (2), 303 (a) (3), or 303 (a) (4). If Congress had intended that 303 (a (1) would not be applicable, if the offending Union was a certified representative, this qualification would have been made a part of 303 (a) (1), or, as suggested by the lower Court, 303 (a) (1) and 303 (a) (2), could have been combined into one section, with the exception included. Each section refers to a separate activity, or violation, and no good reason has been shown why one paragraph should be combined with, or should qualify another. As pointed out in the opinion of the lower Court, the exclusion of certain activities by the use of the word "unless" is provided for in two of the four paragraphs.

The failure to include such exception in 303 (a) (1) indicates definitely that the exception is not applicable to that paragraph.

> "* * * The rule is that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."
>
> *Maxwell* v. *Moore,* 22 Howard 185.

Petitioners' characterization of the lower Court's opinion as "judicial legislation" is unjustified. Actually, petitioners are seeking judicial legislation to make operative by implication an exception not made by Congress.

> "There must be plain and strong ground for depriving language of a statute of full operation before the Court is justified in confining it to a field more restricted than that comprehended within the literal words. Nullification of the words in the statute by implication, such as is sought by the argument that the two sections discussed are completely correlative, is not favored in the law."
>
> *In re David Bell Scarves, Inc.,* 52 F. 2d 755. Affirmed, 61 F. 2d 771.

A remedy in the courts not expressly given should not be inferred.

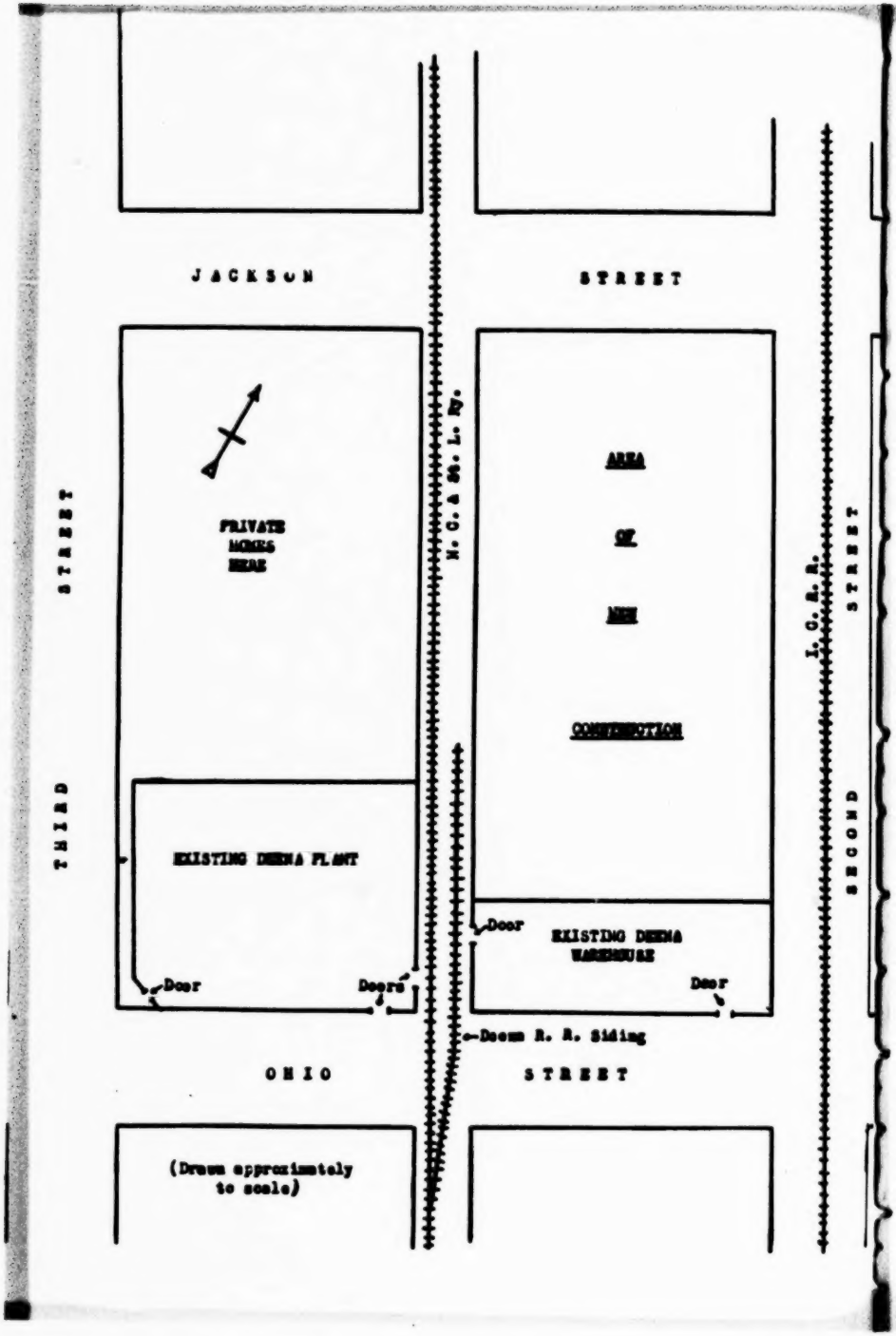
Amazon Cotton Mill v. *Textile Workers Union,* 4th Circuit, 167 F. 2d 183.

Timkin-Detroit Axel Company v. *N. L. R. B.,* 6th Circuit, 197 F. 2d 512.

Inferences from "the meager legislative history" are not helpful where there is no ambiguity. The legislative intent, gathered from the Act itself, is consistent with the ruling of the lower court in its refusal to limit the application of 303 (a) (1).

Respectfully submitted,

JAMES G. WHEELER,
WHEELER & MARSHALL,
901-6 Citizens Bank & Trust Bldg.,
Paducah, Kentucky,
Counsel for Respondent.


JACKSON
STREET
THIRD
STREET
PRIVATE
HOMES
NEAR
M. C. & St. L. Ry.
AREA
OF
NEW
CONSTRUCTION
I. C. R. R.
SECOND
STREET
EXISTING DEENA PLANT
Door
Doors
Door
EXISTING DEENA
WAREHOUSE
Door
Doors R. R. Siding
OHIO
STREET
(Drawn approximately
to scale)

Minton

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 419

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR

Petitioners,

vs.

DEENA ARTWARE, INCORPORATED

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

---

JOSEPH S. FREELAND,
Citizens Savings Bank Building,
Paducah, Kentucky.
NATHAN DUFF,
280 Hobart Street,
Perth Amboy, New Jersey.

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
JOSEPH E. FINLEY,
736 Bowen Building,
Washington 5, D. C.

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 419

THE UNITED BRICK & CLAY WORKERS OF AMERICA AND THE AMERICAN FEDERATION OF LABOR

Petitioners,

vs.

DEENA ARTWARE, INCORPORATED

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

---

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that this Court grant rehearing of its order of December 8, 1952, denying the Petition for Writ of Certiorari, and that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the petition filed October 27, 1952, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioners desire to abandon the first point raised in their Petition for Writ heretofore filed—a point perhaps involving examination of the record herein—and, instead, now seek to rely solely on the second point raised in such petition which is purely a point of law, namely, does Section 302 (a) (2) of the Taft-Hartley Act (or its counterpart Section 8 (b) (4) (B)) operate to permit so-called "secondary activity" or "secondary boycotts" by a certified labor organization in order to acquire recognition or bargaining rights for such certified labor organization? Petitioners contend that it does. This Petition for Rehearing contains additional Congressional history not presented in the original Petition which clearly evidences that the section should be construed as contended for by petitioners. In addition, there is a conflict between Board administrative practice in the dismissal of charges alleging secondary activity where investigation shows that the secondary activity is for the purpose of acquiring recognition for a certified union,[1] and the decision of the Sixth Circuit herein, which construes Section 303 (a) (2), as *not* permitting secondary activity by a certified union for the purpose of securing bargaining rights in any situation in which Section 303 (a) (1) would also be violated.[2]

---

[1] Telephone conversation between writer of this brief and David Findling, Associate General Counsel, National Labor Relations Board.

[2] The two subsections read as follows:

"Sec. 303 (a). It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;"

The Sixth Circuit's construction would, of course, render Section 303 (a) (2) meaningless for the reason that in almost every conceivable situation any attempt to invoke Section 303 (a) (2), such, for instance, as was done by the unions involved in the present case, would at the same time constitute a violation of Section 303 (a) (1), rendering the unions involved, again as here done, liable for damages.

The Sixth Circuit, in arriving at such a conclusion, expressed some doubt as to its validity, indicating that there was "some basis" for the construction contended for by petitioner. In addition, all the legal writing in the field respecting this section affirms the construction contended for by petitioner. See Dennis, *The Secondary Boycott*, 1 New York Univ. Annual Conference on Labor 359, at 370, and *Developments in the Law—The Taft-Hartley Act*, 64 Harvard Law Rev. 781, at 804.

The legislative history not set forth in the original petition is as follows: Senator Taft, during that course of the Congressional debates in which he explained to the Senate the meaning of the various provisions of the Taft-Hartley Act, said of Section 8 (b) (4) (B) (or its counterpart Section 303 (a) (2)) (93 Cong. Rec. 3954):

> "It is made an unfair labor practice for any union to engage in an indirect organizational strike. That is to say, the teamsters cannot go to a store and say, 'Unless you sign up with the clerks' union, we are going to boycott your store,' *unless* the clerks' union has been certified as a bargaining agent by the National Labor Relations Board." (Emphasis supplied.)

The key word in Senator Taft's explanation is the word "unless" which gives the statute the exact effect contended by petitioners. Accordingly, under Senator Taft's explanation, if the clerks' union had been certified as a bargaining agent, the boycott for recognition would be lawful. That is the precise situation in the instant matter.

It is respectfully submitted that a very important question concerning the meaning and construction of Section 303 (a) (2) of the Taft-Hartley Act is here involved, requir-

ing determination by this Honorable Court. Labor organizations throughout the country have been proceeding on the assumption that they have a right to engage in secondary activities to obtain recognition for a certified union—an assumption which seems to be clearly warranted by the plain language of the Act.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari regarding the single question now presented, it is respectfully urged that rehearing be granted and that upon such rehearing a Writ of Certiorari issued to the Court of Appeals for the Sixth Circuit to review the single question of law presented.

Respectfully submitted,

JOSEPH S. FREELAND,
Citizens Savings Bank Building,
Paducah, Kentucky.
NATHAN DUFF,
280 Hobart Street,
Perth Amboy, New Jersey.

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
JOSEPH E. FINLEY,
736 Bowen Building,
Washington 5, D. C.

Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

HERBERT S. THATCHER,
Counsel for Petitioner.